United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Original with affidavit of Mailing

75-6138

BPL

To be argued by
JOSEPHINE Y. KING

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-6138

FRIEDA ROSENBERG,

Appellant,

—against—

ELLIOT RICHARDSON, Secretary of Health, Education and Welfare,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

JOSEPHINE Y. KING,
Assistant United States Attorney,
Of Counsel.

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TABLE OF CONTENTS

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Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Eastern District of New York, (Mishler, *Ch. J.*), in favor of the Secretary of Health, Education and Welfare, entered on November 19, 1975, dismissing the complaint. The judgment sustained the Secretary's determination (a) that the appellant is entitled to wife's and widow's insurance benefits through November, 1971, because of her alleged marriage to the deceased wage earner, Max Rosenberg and (b) that Mr. Rosenberg's first and true wife and widow, Celia, is entitled to widow's benefits thereafter.

Appellant contends that the District Court erred in affirming the Secretary's decision on the grounds that there was an improper application of the law to the

facts and that the decision was not supported by substantial evidence. Appellee takes the position that the record amply and clearly establishes the nullity of the Mexican mail order divorce purporting to dissolve the marriage of Max and Celia Rosenberg. Upon certification of Celia's entitlement to widow's benefits in December of 1971, Frieda Rosenberg's claim for subsequent benefits failed by operation of law.

Statement of the Case

I. Frieda Rosenberg's Claim for Wife's Insurance Benefits

Max Rosenberg, the wage earner, through whom Frieda Rosenberg claims benefits was born in 1898 (T. 65). He married Celia Beck in 1920 in New York City (T. 192).[1] The wage earner stated that he obtained a mail-order Mexican divorce from Celia in 1923, while both parties resided in New York City (T. 70).

Frieda Silverstein, born in 1907, had been married to Herbert Ontville and divorced him in 1932 (T. 74). She and Max Rosenberg were ceremonially married on October 26, 1935 in Greenwich, Connecticut (T. 68).

Frieda Rosenberg made application on January 8, 1969 for wife's insurance benefits pursuant to section 202(b) of the Social Security Act, 42 U.S.C. 402(b) as the wife of the insured wage-earner Max Rosenberg (T. 57-60). On June 6, 1969, the Claims Authorization Branch wrote Frieda Rosenberg that she did not qualify for benefits since the requirement that an applicant "has gone through a marriage ceremony in good faith even though the marriage was not valid," "does not apply

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[1] Numerals preceded by "T." refer to pages in the transcript.

unless you were living in the same household with your husband at the time your application was filed." (T. 73). Mrs. Rosenberg requested reconsideration on June 12, 1969.

The original denial was upheld on October 14, 1969 (T. 96-99). The conclusion reached was that New York, the place of the wage earner's domicile, would not recognize the validity of Max's divorce from his first wife. Although the claimant was, thus, ineligible under the provisions of section 216(h)(1)(A), she could have qualified for wife's insurance benefits under section 216(h)(1)(B) of the Act, *infra*, 42 U.S.C. § 416(h)(1)(A)(B) if she had established that she was living with the wage earner. However,

> The evidence submitted and the statements of Mr. Rosenberg indicate that the separation was not a temporary one and that ill health of the wage-earner was not the only reason for the separation. The separation was due to a generally inharmonious relationship between the claimant and her husband. Mrs. Rosenberg was not living with her husband at the time she filed her application for wife's insurance benefits and thus cannot qualify as the wife of the wage-earner within the meaning of Section 216(h)(1)(B) of the Social Security Act (T. 98).

Mrs. Rosenberg filed a Request for Hearing on December 17, 1969 (T. 35). A hearing was held before Hearing Examiner, Charles A. Smith, on June 2, 1970 in Jamaica, New York, at which the claimant, Frieda Rosenberg, and her attorney, Morris Aarons, Esq., appeared (T. 36).

The Hearing Examiner determined that Frieda Rosenberg was not entitled to wife's insurance benefits on the

basis of his findings that she could not meet the requirements of 42 U.S.C., 416(h)(1)(A) or (B), *infra*. Under (A) the invalidity of Max Rosenberg's Mexican divorce deprived her of the status of a wife or a "deemed to be wife" under New York law. Under subparagraph B, she met the requirement of a good faith marriage to the wage earner but failed to establish that she and Max were living in the same household at the time of her application for benefits (T. 24-26).

The Hearing Examiner's decision became the final decision of the Secretary on March 5, 1971. The claimant thereupon brought an action in federal district court.

A. The Evidence.

A summary of the evidence, both testimonial and documentary, before the Hearing Examiner and thereafter, before the Secretary and the District Court for determination of Frieda Rosenberg's claim to wife's insurance benefits includes statements which (1) supported Frieda's *de facto* if not *de jure* status as Max's wife, (2) presented inconsistent and incomplete versions of the Mexican divorce proceedings and (3) permitted opposite conclusions on the issue of whether Frieda and Max lived together in the same household after 1966.

(1) Frieda testified that she married Max in 1937 (T. 41-42, 68) believing he was validly divorced; they had always lived together as husband and wife, had two children and four grandchildren (T. 43-44, 47). She stated that she had never worked; Max always supported her (T. 44). They attended family functions together (T. 48). They bought a home in Rockaway where they spent their summers until the house burned in 1968 (T. 46).

Frieda in her application of 1969 (T. 58) stated she had no previous marriage.

(2) Max Rosenberg made statements to the Social Security Administration that he divorced his first wife, Celia, in 1933. It was a mail order divorce, and neither party resided in Mexico at the time of the divorce. Max declared "Celia was served with notice of the divorce proceeding; I don't know if it was in person or by mail. I don't believe she ever filed an answer or appeared in court." (T. 70).

Frieda in her statement to the Social Security Administration wrote "We were married in Conn. because we were told our marriage would be legal if married in Conn." (T. 72). Both Max's and her divorce papers were destroyed by fire (T. 54, 74) but at the time of their marriage by a justice of the peace in Connecticut, she stated, they showed him their divorce papers (T. 42).

(3) Max Rosenberg maintained his voting residence and paid the rent for the apartment and the garage at the Flushing, New York address (T. 48, 50), visited there either about once a month (his version, T .77) or once a week (Frieda's version, T. 80-81). He stayed with his sister in Spring Valley, New York, after 1966 because he was ill and needed quiet (Frieda, T. 73, 83) or because he was having marital difficulties (Max, T. 76-77, 87). Both parties informed the Social Security Administration that each wished individual benefit checks to be mailed to his or her separate address (T. 60, 67).

B. The Decision.

After a consideration of the entire record, the Hearing Examiner (first hearing, 1970, T. 20-26) concluded that Frieda was not entitled to wife's insurance benefits be-

cause she was not living with Mr. Rosenberg at the time her application was filed in 1969 (Section 216(h)(1)(B), 42 U.S.C. 416(h)(1)(B), *infra*). In reaching this determination, the Hearing Examiner found that Max Rosenberg's Mexican divorce did not terminate his marriage to Celia; consequently, the Connecticut marriage of Max and Frieda in 1935 was not valid under the laws of New York. Since Celia at this point had not filed a claim as Max's wife, Frieda could have been entitled to benefits as a "deemed" spouse had she met the "living in the same household" requirement of the statute. The Hearing Examiner's determination that she failed to satisfy this requirement was upheld by the Appeals Council on March 5, 1971 (T. 3).

Frieda Rosenberg then instituted an action in April, 1971 in federal district court pursuant to § 205(g) of the Act, 42 U.S.C. § 405(g), to review the final decision of the Secretary.

II. The Claims for Widow's Benefits

The character of the original proceeding as a claim by Frieda Rosenberg for wife's insurance benefits was substantially affected by several events which resulted in an order of the Honorable Jacob Mishler (*Ch.J.*) on January 29, 1973 remanding the case to the Secretary.

The wage earner, Max Rosenberg, died on April 14, 1971 (T. 215). On June 11, 1971, Celia Rosenberg filed an application for widow's insurance benefits (T. 182-85) and on June 18, 1971, Frieda Rosenberg applied for widow's benefits (T. 198-201).

A. The Evidence.

At the supplemental hearing held on August 24, 1973 before Administrative Law Judge S. Theodore Shapiro, both Frieda Rosenberg and Celia Rosenberg testified.

The following is a summary of the additional evidence adduced at that hearing.

Frieda Rosenberg testified that Max informed her in 1933 that he obtained a Mexican divorce (T. 169-70) with Celia's signature (T. 171). A joint tax return of Max and Frieda Rosenberg for 1970 was received in evidence (T. 174, 203-04). The remainder of her statements repeated her testimony in the 1970 hearing relative to the husband and wife relationship she and Max had maintained during the years following their marriage in 1935.

Celia Rosenberg testified at the supplemental hearing that she married Max on June 19, 1919 (The Administrative Law Judge stated the year as 1920, T. 153). She stated she lived with him "off and on;" they had three sons and he brought or sent her money for support (*Id.*), visited periodically and obtained jobs for their sons when they were grown. Celia asserted she last saw Max in 1951 or 1952 (T. 165). She knew of no divorce and was never served with any papers relating to a divorce (T. 160, 167), and never signed any papers (T. 162). According to Celia, she first learned of Max's remarriage when she was notified of his death (T. 161).

Celia Rosenberg applied for Social Security benefits on her own behalf in 1967. On the application form Celia listed her husband's name as "Louis Rosenberg" and stated a date of death for her husband of May 8, 1954 (T. 186). When questioned concerning these entries she testified "That's an error" (T. 156-57). On her application for retirement insurance benefits, she checked the category "widowed" and asserted "I am not filing as a widow as my own benefits will be higher" (T. 186).

B. The Decision.

Upon this remand, the Administrative Law Judge agreed with the determination of the Secretary in the

prior proceedings that because the Mexican divorce was a nullity, Frieda was not the legal spouse of Max. However, the Administrative Law Judge disagreed with the previous determination disqualifying Frieda under Section 416(h)(1)(B), *infra*, and found that Frieda was living in the same household with the wage earner. Therefore, Frieda Rosenberg as a "deemed" widow was entitled to benefits through November, 1971.[1] Celia Rosenberg as Max's legal widow was certified to receive the subsequent payments of benefits.

The Administrative Law Judge's decision as supplemented by the Appeals Council became the final decision of the Secretary on September 19, 1974 (T. 128-31).

The District Court having retained jurisdiction of the action heard defendant's motion for judgment on the pleadings and dismissed the complaint (Memorandum of Decision and Order, Nov. 18, 1975; A. 3a).[2] The court held that substantial evidence supported the Secretary's determination.

III. Applicable Statute and Regulation

Section 216(h)(1) of the Act, 42 U.S.C. § 416(h)(1) provides that:

> (A) An applicant is the wife, . . . widow, . . . of a fully or currently insured individual for purposes of this subchapter if the courts of the State in which such insured individual is domiciled at the time such applicant files an application, or, if such insured individual is dead, the courts of the State in which he was domiciled at the time of death . . . would find that such applicant and such insured individual were validly married at the time such applicant files such application or, if such insured

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[1] 42 U.S.C. § 416(h)(1)(B) and 20 C.F.R. § 404.329(a)(4), *infra* at 10, 11.

[2] Numerals preceded by "A." refer to pages in Appellant's Appendix.

individual is dead, at the time he died. If such courts would not find that such applicant and such insured individual were validly married at such time, such applicant shall, nevertheless be deemed to be the wife, . . . widow, . . . of such insured individual if such applicant would, under the laws applied by such courts in determining the devolution of intestate personal property, have the same status with respect to the taking of such property as a wife, . . . widow, . . . of such insured individual.

(B) In any case where under subparagraph (A) an applicant is not (and is not deemed to be) the wife, widow . . . of a fully or currently insured individual, or where under subsection (b), (c) . . . of this section, such applicant is not the wife, widow . . . of such individual, but it is established to the satisfaction of the Secretary that such applicant in good faith went through a marriage ceremony with such individual resulting in a purported marriage between them which, but for a legal impediment not known to the applicant at the time of such ceremony, would have been a valid marriage, and such applicant and the insured individual were living in the same household at the time of the death of such insured individual or (if such insured individual is living) at the time such applicant files the application, then, for purposes of subparagraph (A) and subsection (b), (c) . . . of this section, such purported marriage shall be deemed to be a valid marriage. The provisions of the preceding sentence shall not apply (i) if another person is or has been entitled to a benefit under subsection (b), . . . (e), . . . of section 402 of this title on the basis of the wages and self-employment income of such insured individual and such other person is (or is deemed to be) a wife, widow . . . of such insured individual under sub-

> paragraph (A) at the time such applicant files the application, ... The entitlement to a monthly benefit under subsection (b), ... (e), ... of section 402 of this title, based on the wages and self-employment income of such insured individual, of a person who would not be deemed to be a wife, widow, ... of such insured individual but for this subparagraph, shall end with the month before the month (i) in which the Secretary certifies, pursuant to section 405(i) of this title, that another person is entitled to a benefit under subsection (b), ... (e), ... of section 402 of this title, on the basis of the wages and self-employment income of such insured individual, if such other person is (or is deemed to be) the wife, widow, ... of such insured individual under subparagraph (A) .... For purposes of this subparagraph, a legal impediment to the validity of a purported marriage includes only an impediment (i) resulting from the lack of dissolution of a previous marriage or otherwise arising out of such previous marriage or its dissolution, or (ii) resulting from a defect in the procedure followed in connection with such purported marriage.

Section 404.329 of the Regulations, 20 C.F.R. § 404.329(a) provides in relevant part that:

> A widow or surviving divorced wife is entitled to widow's insurance benefits beginning with the first month in which all the conditions of entitlement described in section 404.328(a) are satisfied and ending with the month before the first month in which any of the following events occurs:
>
> (4) In the case of a woman entitled to widow's insurance benefits based on a purported marriage (see section 404.1101(c)(2)) to the deceased in-

dividual, another woman is certified for entitlement to widow's insurance benefits based on such deceased individual's earnings record and such other woman is the widow (or is deemed to be the widow) of the deceased individual under the provisions of section 216(h)(1)(A) of the Act . . . .

ARGUMENT

POINT I

The Court was correct in its determination that substantial evidence and a proper application of the law supported the Secretary's denial of benefits to the claimant.

Points I and II of appellant's brief challenge the reasonableness and fairness of the Court's application of the law. Point III appears to contend that the law was applied to erroneous findings of fact. We understand appellant's position to be, therefore, that if the law were "properly" applied, *i.e.*, liberally transfused with the warm-blooded principles of equity, and if the Court accorded claimant Frieda Rosenberg's marriage the benefit of a virtually irrebutable presumption of validity, the Court could have discovered evidence to justify her claim. Instead, the District Court found that the record contained substantial proof to support the Secretary's denial of benefits (A. 4a).

In order to establish entitlement to benefits, plaintiff has the burden of proof that the required conditions for eligibility are met. *Franklin* v. *Secretary of Health, Education and Welfare*, 393 F.2d 640 (2d Cir. 1968); *Rocker* v. *Celebrezze*, 358 F.2d 119 (2d Cir. 1966).

Section 205(g) of the Act provides that the findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive. Accordingly, the Secretary's findings, if reasonable, should not be disturbed by the court on review. *Herbst* v. *Finch*, 473 F.2d 771, 774 (2d Cir. 1972); *Gold* v. *Secretary of Health, Education and Welfare*, 463 F.2d 38, 41 (2d Cir. 1972). *Richardson* v. *Perales*, 402 U.S. 389 (1971); *N.L.R.B.* v. *Walton Manufacturing Co.*, 369 U.S. 404 (1962). It has been held that the conclusive effect of the substantial evidence rule applies not only to the Secretary's findings of basic evidentiary facts but also to inferences and conclusions drawn therefrom. *Levine* v. *Gardner*, 360 F.2d 727 (2d Cir. 1966); *Rocker* v. *Celebrezze*, *supra*.

We believe that the entire record, fairly read and evaluated, supports the conclusion that the claimant is not, legally, the widow of Max Rosenberg.

Appellant is critical of the Secretary's application of the law, that it is "strict" and "technical". Indeed it may be; it is also correct, given the language of the statute.

Section 216(h)(1)(A) of the Act, 42 U.S.C. § 416 (H)(1)(A), *supra*, provides that an applicant for benefits is a wife or widow if, at the time she applies for benefits, the courts of the state of domicile would find either:

(a) that she was validly married to the insured, or

(b) that she was deemed to be a wife for purposes of intestate distribution of personal property

If, as the District Court and the Secretary perceived, Frieda Rosenberg could not qualify under (a) or (b), we then proceed to the alternative, subparagraph (B) of the statute. If the applicant

(a) married the insured in good faith without knowledge of the legal impediment to the marriage, and

(b) resided in the same household as the insured at the time she applied for benefits, then the purported marriage would be deemed a valid marriage, *provided*,

(c) another person was not entitled to the benefits as the wife or widow of the insured wage earner.

Although Frieda Rosenberg met the first two requirements under (B), her claim was defeated by the certification that Celia Rosenberg was entitled to benefits as the legal spouse and widow of the wage earner. The plain language of the statute commands this result once the rights of the legal spouse are asserted and formally recognized.

Thus, the crucial issue is what legal effect, if any, attaches to the divorce allegedly obtained by Max Rosenberg from his first wife, Celia. It is clear that where both parties have appeared and at least one has alleged domicile or established residence in the divorce forum and the question of domicile has been argued, the divorce is entitled to full faith and credit. *Davis* v. *Davis*, 305 U.S. 32 (1938); *Sherrer* v. *Sherrer*, 334 U.S. 343 (1948); *Coe* v. *Coe*, 334 U.S. 378 (1948).

But here the question is not one of full faith and credit but a matter of comity, if the divorce is sought outside the United States. Specifically, as to Mexican mail-order divorces, where neither party personally appears, courts "have almost invariably . . . denied [them] legal effect."[2] By his statements, Max Rosenberg ad-

[2] Reese & Rosenberg, Conflict of Laws 861 (6th ed., 1971).

mitted that both he and Celia resided in New York at the time he allegedly obtained the Mexican divorce. The record is completely devoid of any suggestion that he personally appeared in any divorce proceeding in Mexico.

The statute, section 216(h)(1)(A) refers to the courts of the insured's domicile for the law governing the marital status of an applicant for benefits. While New York courts have given effect to bilateral Mexican divorces, they have insisted that there be some minimal personal contact with the divorce forum. In *Rosenstiel* v. *Rosenstiel*, *Wood* v. *Wood*, 16 N.Y. 2d 64, 209 N.E. 2d 709 (1965), the plaintiff spouse, a New York domiciliary, was physicially present in Mexico and "carried with him legal incidents of the marriage itself. . . ."[3] Furthermore, the respondent voluntarily appeared in the Mexican court by attorney.

In *Caldwell* v. *Caldwell*, 298 N.Y. 146, 81 N.E. 2d 60 (1948), the Court observed that "there is not even the slightest color of jurisdiction" in a Mexican mail-order divorce. And in *Rosenbaum* v. *Rosenbaum*, 309 N.Y. 371, 376, 140 N.E. 2d 902, 904 (1955), where the complaint alleged that defendant visited Mexico solely to sign divorce papers, the Court characterized such a divorce action as "a clear legal nullity . . . and of no more validity than a so-called mail-order divorce, from which we said 'no rights of any kind may spring'. . . ."

In summary, the highest court of New York has firmly established the law applicable to the instant case:

> . . . where a divorce has been obtained without any personal contact with the jurisdiction by either party or by physical submission to the jurisdiction by one, with no personal service of process within

[3] 16 N.Y. 2d at 72, 209 N.E. 2d at 711.

> the foreign jurisdiction upon, and no appearance or submission by, the other, decision has been against the validity of the foreign decree. . . .[4]

The marriage of Max and Frieda Rosenberg would not be recognized as valid by the courts of New York because Mr. Rosenberg's purported divorce from Celia was a nullity. Whether New York, in judging the validity of the second marriage, would apply its own law as the state of the marital domicile, or look to the law of Connecticut as the forum which the parties visited for the purpose of celebrating the marriage,[5] we believe the fatal jurisdictional defect in the divorce proceedings would bar recognition both of the divorce and of the subsequent marriage.

In the instant case, appellant would neutralize or avoid the application of the legal requirements for a valid, foreign divorce by raising the first wife's failure to launch an earlier attack on the second marriage and by a presumption favoring the later marriage.

Appellant's counsel in his brief states as a factual proposition, without any point of reference to the record, that Celia "knew of the divorce proceedings and never took any steps to disown it or collaterally attack it" (Appellant's Brief at 5). Further, counsel writes "Celia knew of the marriage of the wage earner to Frieda." (*Id.*) Quite to the contrary, Celia testified that she possessed no knowledge before Max's death of his divorce

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[4] *Id.*

[5] Restatement, Second, Conflict of Laws § 283.
". . . the state most interested in the validity or nullity of the status of marriage is that in which the purported family will live. . . ." Taintor, What Law Governs the Ceremony, Incidents and Status of Marriage 736, in Ass'n of Am. Law Schools, SELECTED READINGS ON CONFLICT OF LAWS (1956).

or second marriage (T. 161-162) and we find nothing in the record to controvert her statement. Evidence of Celia's knowledge of the purported marriage of Max to the claimant appears for the first time in Celia's application for widow's benefits, dated June 11, 1971 (T. 185). Without such knowledge, Celia cannot be charged with laches for not attacking the divorce before 1971. Since Celia never remarried and thus did not rely upon an invalid decree, there is no estoppel which bars her present claim as the wage earner's widow.[6]

The presumption of the validity of the second of two successive marriages is not irrebutable. It is overcome "by evidence that a decree of divorce dissolving the prior marriage was invalid. . . ."[7] *In Re Price's Estate*, 11 Misc. 2d 716, 174 N.Y.S. 2d 1013 (Sur. Ct. N.Y. County 1st Dep't 1959, 1958), *aff'd*, 8 A.D. 2d 721, 187 N.Y.S. 2d 333 (1st Dep't 1959) involved a Mexican mail order divorce. Neither party resided in Mexico or appeared before the court. The divorcing spouse relied upon the decree's validity in remarrying. The court, however, declared the divorce a nullity and refused to recognize the subsequent marriage.

The Appellate Division in *Apelbaum* v. *Apelbaum*, 7 A.D. 2d 911, 183 N.Y.S. 2d 54 (2d Dep't 1959) applying the law of the state (New Jersey) in which the marriage was performed as the law governing the validity of the marriage commented that the same principles obtained both in New York and New Jersey. In *Apelbaum*, the wife procured a Mexican divorce; respondent was not served with process and neither party appeared in the divorce forum. Her second husband had knowledge of

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[6] Goodrich, Conflict of Laws 259-60 (4th ed. Scoles, 1964).

[7] I Foster & Freed, Divorce, Separation and Annulment 103-04 (1972).

the Mexican divorce before he married her. The court held that the presumption favoring the second marriage could not cure or overcome the nullity of the Mexican divorce. Furthermore, "a person who knows that the one he is about to marry had procured a Mexican decree of divorce under circumstances such as these is charged with knowledge that such decree is a nullity. . . ." (*Id.*, 183 N.Y.S. 2d at 56).

In *Matter of the Application of Carr*, 134 N.Y.S. 2d 513, 518 (Sur. Ct. Chautauqua County, 1953), *aff'd*, 284 App. Div. 930, 134 N.Y.S. 2d 280 (4th Dep't 1954), where one of the parties to a concededly valid first marriage was living, the court declared, "it cannot be presumed in order to validate the other marriage that the former has been dissolved as against her [the first wife's] express declaration that it has not been dissolved." The burden of establishing the dissolution was on the party attacking the marriage.

A New York Court did apply the presumption in favor of the second marriage in *DeMilio* v. *New York State Thruway Authority* 235 N.Y.S. 2d 642 (Ct. of Claims 1962). The first wife had lived with the decedent for three days; they had never had a home together and she never represented herself as Mrs. DeMilio. An attorney drew up a separation agreement for the couple and she stated she intended to secure a divorce in Reno, Nevada. Under these circumstances, the court held that the second wife, who had lived with decedent from 1948 until his death, and the three children born of that marriage were entitled to the wrongful death award.

By contrast, in *Estate of Terry*, 32 Misc. 2d 470, 222 N.Y.S. 2d 865 (Sur. Ct. New York County 1961), the facts virtually parallel the instant case. The first marriage occurred in 1926. After five years, the husband

abandoned his wife and in 1945 he remarried. At his death, both widows claimed his estate. The court held that the presumption of validity attaching to the second marriage was overcome and the burden of proving that decedent had legal capacity to enter into the second marriage rested upon the second wife. In *Terry* as in the instant case, the first wife testified that she had never been served with process in a divorce action.

The presumption of the validity of Max Rosenberg's second marriage cannot survive in the face of the facts that Max and Celia Rosenberg were lawfully married in 1920 and that the marriage was not dissolved by the mail order divorce or any other divorce (T. 130).

In March, 1969, the wage earner furnished a statement concerning the Mexican divorce (T. 70); he never stated that he attempted to procure another divorce and a search of divorce records revealed no evidence that the first marriage was dissolved. Further, Celia testified that she did not divorce Max. The first marriage remained a subsisting and legal marriage entitling Celia Rosenberg to widow's benefits under the applicable statute.

CONCLUSION

The order of the District Court should be affirmed.

Dated: May 24, 1976

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

JOSEPHINE Y. KING,
Assistant United States Attorney,
Of Counsel.

COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

LYDIA FERNANDEZ being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 27th day of May 19 76 he served ~~a copy~~ two copies of the within

Brief for the Appellee

by placing the same in a properly postpaid franked envelope addressed to:

Fleishaker & Shulman, Esqs.
19 West 44th St.
New York, N. Y. 10036

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, ~~Washington Street~~ 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Lydia Fernandez
LYDIA FERNANDEZ

Sworn to before me this

27th day of May 19 76

Olga S. Morgan
OLGA S. MORGAN
Notary Public, State of New York
No. 24-4501966
Qualified in Kings County
Commission Expires March 30, 1977